IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.1145 OF 1996
IN
NOTICE OF MOTION NO.5 OF 1998
IN
SUIT NO.4476 OF 1995

1. Lokhandwala Estates and
Development Company Limited,
48, Indra Narayan Road,
Santacruz (W), Bombay 400 054.

2. Mr.Siraj Taherali Lokhandwala,
48, Indra Narayan Road,
Santacruz (W), Bombay 400 054. Appellants

versus

Goregaon Siddharth Nagar Sahakari
Griha Nirman Sanstha Limited,
81/648 Siddharth Nagar No.1,
Road No.II, Goregaon (W),
Bombay 400 104 through the
Administrator Mr.S.M.Mhadgut Respondent

Mr.Virag Tulzapurkar with Mr.Percy Mody with Ms.Maya Sarkar i/by M/s.B.Munim & Co. for appellants.

Mr.S.H.Doctor, Sr.Counsel with Dr.Y.R.Naik, Sr.Advocate for respondent.

CORAM : DR.S.RADHAKRISHNAN AND
S.C.DHARMADHIKARI, JJ.

DATE OF DECISION : 28th October 2005

DATE OF GIVING REASONS : 8th December 2005

JUDGEMENT : (S.C.DHARMADHIKARI, J.) :-

1. This appeal is directed against an order

dated 27th September 1996 in Notice of Motion No.5 of 1996 in the aforesaid suit.

2. By the order under appeal, the learned Single Judge (S.N.Variava, J. as His Lordship was then) dismissed the Notice of Motion.

3. The appellants are original plaintiffs whereas respondent is the original defendant.

4. The appellants instituted abovementioned suit in this Court claiming a declaration that the agreement dated 23rd November 1992 (Annexure-I to the plaint) is valid, subsisting and binding on the defendant and that they be ordered and decreed to specifically perform the same. Alternate prayer in the suit was for a decree in the sum of Rs.3,68,841/- along with interest as per the particulars of claim marked Annexure-J to the suit with a further prayer that it should be declared that repayment of the aforesaid amount is secured by a valid and subsisting statutory charge on the right, title and interest of the defendant in the land allotted to them. Further, it was prayed that the charge may be allowed to be enforced by the Court in the manner more particularly set out in prayer (d)(iii).

5. After institution of the suit, an application by way of Notice of Motion No.5 of 1996 was made for interlocutory reliefs. The said reliefs were sought in the following terms:-

> (a) That pending the hearing and final disposal of the suit the Court Receiver, High Court, Bombay or such other person as this Honourable Court may deem fit be appointed Receiver of the allotted land including the right, title and interest of the Defendants therein with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908;
>
> (b) that pending the hearing and final disposal of the suit, the Defendants by themselves, their servants, agents and nominees be restrained by an order and injunction of this Honourable Court from in any manner -
>
> (i) obstructing or interfering with the construction and development work being carried out and to be carried out by the Plaintiffs on the allotted land.
>
> (ii) alienating, disposing of, encumbering or parting with possession of the said allotted land described in Exhibit 'E' to the plaint or the structure or structures standing or constructed thereon or any part thereof or creating any third party rights or interest therein or any part thereof and/or inducting any one in the buildings already constructed on the said allotted land and/or which may be hereafter constructed on the said allotted land by the Plaintiffs;
>
> (iii) appointing any contractors or developers for carrying out the construction on the said allotted land;
>
> (iv) disposing of, alienating,

encumbering or putting up any construction or allowing any third party to put up any construction on the part of the land shown as Part B on the Plan annexed as "Exhibit ‘F’ to the Plaint or any part thereof;

(v) surrendering or handing over possession of the premises in the old structures presently occupied by the members/tenants of the Defendants on the remaining part of the Defendants land save and except in accordance with the said Agreement dated 23rd November, 1992;

(c) for ad interim reliefs in terms of prayers (a) and (b) above;

(d) cost of the Notice of Motion be provided and

(e) for such further and other reliefs as the nature and circumstances of the case may require."

This Notice of Motion was taken out on 1st January 1996. The application for interlocutory reliefs as above was supported by an affidavit of the second plaintiff.

6. It is the case of the plaintiffs that Bombay Housing Board was seized and possessed of pieces and/or parcels of land situate lying and being at Goregaon (West) Taluka Andheri, bearing City Survey No.261 (part) and 264 of City Survey Goregaon. Bombay Housing Board constructed several single storeyed structures consisting of 808 single room tenements for allotment to eligible persons falling under low income group

as per the rules of the said Board. The said land and premises are known as "Siddharth Nagar, Vibhag I", and the tenements therein were allotted to the tenants by the Board. Maharashtra Housing and Area Development Authority became the successor in the interest of the said Board. Out of the original 808 tenements, 136 tenements were demolished and the remaining 672 structures became unfit for habitation due to the passage of time. MHADA considered it advisable to demolish the remaining 672 tenements and to construct multi-storeyed buildings in their place and provide the present occupants of 672 tenements with accommodation therein of suitable area. The occupants of 672 tenements requested MHADA that 12 acres of the said land be allotted to them at a nominal rent construction and allow them to construct either by themselves or through a builder and/or developer. The said occupants formed a co-operative Society viz. Goregaon Siddharth Nagar Sahakari Griha Nirman Sanstha Limited being the respondents herein.

7. It is the case of the appellants that the said land which is more particularly described as annexures A and B was purported to be handed over

to the respondent society. By letter dated 16th June 1996 addressed by appellant no.2 to the respondents, an offer was made to develop the said land to be alltted by MHADA on the terms and conditions recorded in the letter.

8. The further case is that by a Resolution dated 9th September 1986 passed by the respondent it was resolved that appellant no.2 would be appointed as developer for development of the land which is proposed to be allotted to the respondent. After this followed a letter dated 11th September 1986 from the respondents to appellant no.2 agreeing to execute an agreement provided, appellant no.2 accepts modifications suggested by the respondent. It is further contended that the appellant no.2 by his letter dated 13th September 1986, inter alia, agreed to the terms and conditions mentioned in the respondents letter subject to the modifications/amendment/clarification set out in this letter. It is further contended that respondents by their letter dated 15th September 1986 addressed to appellant no.2 clarified some of the points raised by appellant no.2 in his letter dated 13th September 1986.

9. It is then contended that appellants and respondents filled in and filed a statement in Form No.37-EE with the Appropriate Authority under the provisions of Section 269-B(1) of Income Tax Act. This form was filed on or about 30th September 1986. It is contended that notice under section 269-D(1) of the Income Tax Act, 1961 was issued on 21st January 1988 proposing to acquire the said land. It is contended by an order passed dated 20th August 1990 passed under section 269 D(7) of the Income Tax Act, 1961, the proceedings initiated by the earlier notice were dropped and parties were informed that the land will not be acquired.

10. However, the Income Tax Act, 1961 was amended and Chapter XX-C came into force from 1st October 1986. Hence appellants and respondents filled in and filed with the Appropriate Authority a statement in Form No.37-I without prejudice and under protest. It is contended that in pursuance of this step, the Appropriate Authority issued a certificate under provisions of Section 269-UL(3) of the Income Tax Act on 9th February 1987. It was certified that the Department has no objection to the transfer of land which was the subject matter of an agreement

between the parties.

11. It is then contended that the matter was placed for discussion in General Body Meeting of respondents held on 5th April 1987 wherein the resolution of the Managing Committee dated 9th September 1986 was approved and confirmed. On 8th February 1988 the MHADA allotted to the respondents the area more particularly set out in the letter of allotment.

12. The matter was again discussed on 14th February 1988 before the General Body of respondent and the decision of the Managing Committee was approved. Thereafter, terms and conditions of allotment were communicated by MHADA vide letter dated 14th February 1990. The respondents approached the MHADA with a request to modify certain terms and conditions. The request for modification was accepted and some of the terms and conditions were modified by MHADA by communication to that effect dated 3rd September 1990.

13. It is then contended that the respondents submitted to MHADA for its approval the lay out plan in respect of said land which included a lay

out of the allotted land.

14. It is the case of the appellants that pursuant to the said allotment, MHADA agree to give free of cost to respondents net 8 Acres land out of total 10 acres and further give remaining 2 acres at current market rate to be determined by the Town Planning Department. MHADA permitted the development of the portion (2.63 acres gross area equivalent to 2 acres net area) in accordance with Development Control Regulations.

15. It is then contended that pursuant to negotiations and discussions an agreement was arrived at between the appellants and respondents (Annexure-I) on 23rd November 1992. It was agreed that the respondents would permit the appellants to construct 672 tenements each having an area of 325 sq.ft. carpet. These would be the self contained tenements/flats. In lieu of the same, the respondents, after execution of lease in their favour by MHADA, executed in favour of appellant no.1 and/or their nominees, one or more deeds of sub-lease on the same terms and conditions which are contained in the lease-deed executed by the MHADA in its favour. The terms and conditions recorded by the

appellants and respondents need not be referred to in detail at this stage.

16. It is the case of the appellants that this agreement is registered in the office of Sub Registrar of Assurances, at Bandra on 25th November 1992 under serial No.1196/1992.

17. The appellants referred to certain developments inasmuch as after the agreement was executed the Executive/Managing Committee of the respondent was dissolved. An Administrator was appointed by the authorities exercising powers under the Maharashtra Co-operative Societies Act, 1960.

18. It is the case of the appellants that they learnt that the respondents are trying to rescind agreement. This was the apprehension because a communication was received by the appellants from the Administrator of the respondents that some difference and dispute had arisen amongst the members, inter se. The appellants state further that they took up the matter with the Administrator and had in fact visited the development site with the Administrator from time to time.

19. The case of the appellants if that on account of the internal differences and dispute the members of respondents are trying to oust them from the project. They point out that the complete spade work with regard to the sanctioned lay out and the building plan and construction of three out of total 13 buildings, at huge costs and efforts have been completed, and they cannot be ousted from this project of development. Three buildings consisting of 60 tenements having been constructed. The obligations of the appellants are being carried out. Similarly, the agreement postulates members of the respondents shifting from their old tenements to enable the appellants to demolish them and commence construction of further buildings. It was pointed out by the appellants that they have moved the Municipal Corporation of Greater Bombay (MCGB) for grant of occupation certificate. However, despite demonstrating their readiness and willingness to carry out their obligations, some members of the respondents are adamant and would try to put an end to the suit agreement.

20. It is in these facts and circumstances that the aforesaid suit was instituted by the

appellants and the Notice of Motion was taken out therein.

21. After receipt of the notice, the respondents appeared and filed an affidavit in reply.

22. In the reply which is filed by the Administrator of the respondent society, it was pointed out that he took charge on 28th December 1993. The basic facts are not disputed. However, it was pointed out that the Managing Committee of the society passed Resolutions in it's meeting held on 16th August 1986 and 9th September 1986 and gave the contract of development to the appellants - original plaintiffs. The Managing Committee Resolution had been approved by the General Body in its meeting held on 5th April 1987. It was subsequently discussed in a meeting held on 14th February 1988 and thereafter the subject/suit agreement was executed. It is pointed out that the agreement dated 23rd November 1992 has been registered. The other facts about construction of three buildings, is not disputed in this affidavit which is affirmed on 7th December 1995.

23. However, in a subsequent affidavit filed it

was pointed out by the Chairman of the society that the Managing Committee has not taken into evidence majority of the members of the society while entering into the agreement. It was pointed out that the Managing Committee in power earlier deliberately did not hold the elections and continued to function even after 6th April 1990 which is the last date of their term. All actions of the Managing Committee, therefore, were not in the interest of the members of respondent society, were in violation of the bye-laws and the Maharashtra Co-operative Societies Act and Rules, and were thus contrary to the MHADA Act as well. The agreement was, therefore, termed as patently illegal and contrary to law.

24. In paragraphs 6 and 7 of this affidavit this is what is stated :-

> "6. I say that any agreement between the Defendant Society and the Plaintiffs could only have been made after it was approved by the general body of Defendant Society. The Defendant Society has not approved the agreement dated 23.11.92. This agreement was never placed before the general body before its approval. On 17.2.93 the Assistant Registrar, C.S. (Housing Cell), MHADA, appointed an administrator under section 77A of the M.C.S.Act, 1960 on Defendant Society because of the failure of its managing

committee to hold general body meetings and as their term had expired in the year 1990. Under section 77A of the Maharashtra Cooperative Societies Act, the Administrator could have been in charge of the office of Defendants only till 16.8.93. However, plaintiffs saw to it that the Administrator was continued beyond this period without holding elections. One S..Mhadgut, Advocate was the Administrator on Defendants from December 1993 or thereabouts. I am informed that S.M.Mhadgut was working in the Co-operation Department but had to resign prematurely before superannuating on account of corruption charges. The said S.M.Mhadgut, from the date of his appointment as Administrator on Defendants, was entirely in the pocket of the Plaintiffs. On 16th January 1994 a general body meeting of the Defendant Society was called, which was attended by about 298 members. One of the items on the Agenda was consideration of the Agreement dated 23.11.92 between the Plaintiffs and Defendants. The said agreement was placed before the general body of Defendants for the first time. The said meeting was held under the Chairmanship of S.M.Mhadgut. The general body on 16th January 1994 by 242 against 56 members resolved to reject the agreement dated 23.11.92. An English translation of the proceedings of the meeting held on 16.1.94 of the general body of Defendant Society is annexed hereto and marked Exhibit "1".

7. Immediately thereafter Plaintiffs set up Six members of Defendant Society, three of whom were members of the superseded managing committee to file a dispute being case No.CC-IV/51 of 1994 under S.91 of the Maharashtra Cooperative Societies Act, 1960 inter alia for a declaration that the agreement dated 23.11.92 between Plaintiffs and Defendant Society was valid and subsisting and the same could not be avoided by them. Injunctions pending the dispute were also sought viz from implementing resolution dated 16.1.94 of the general body of Defendants; interfering with the development work of Plaintiffs;

> appointing any other contractor etc. In the said dispute only the administrator S.M.Mhadgut was made a party as has been done in the present suit. The Administrator S.M.Mhadgut colluded with the Disputant members in that case and the ex-parte injunction restraining the implementation of resolution dated 16.1.94; restraining cancellation of the agreement dated 23.11.92 etc. was confirmed. Thereafter twenty four members of the Society including myself have filed Appeal No.443 of 1994 before the Maharashtra State Co-op. Appellate Court, Bombay, to challenge the exparte injunction granted by the Cooperative Court No.IV, Greater Bombay in case No.CC-IV/51 of 1994. The said appeal is at yet pending and the same is being defended by the original Disputants therein who are stooges of the Plaintiffs. Copies of the dispute application and the exparte injunction in the said dispute No.CC-IV/51 of 1994 are annexed hereto and marked Exhibits "2 and 3". A copy of the collusive reply filed by S.M.Mhadgut for Defendant Society is annexed hereto and marked Exhibit "4". A copy of the confirmation of injunction dated 8.7.1994 in Case No.CC-IV/51 of 1994 is annexed hereto and marked Exhibit "5". A copy of the memo in Appeal No.443 of 1994 is annexed hereto and marked Exhibit "6".

25. It is in these circumstances that the respondents pointed out that the appellants are not entitled to any interlocutory reliefs. Pertinently, it was stated that none of the original letters which the appellants have referred to in paragraph 7 of the plaint are on the file of respondent society. Similarly, a serious grievance was raised about the meeting of 5th April 1987 inasmuch as on the agenda of this

meeting there is no item for placing the Resolution dated 9th September 1986 allegedly passed by the Managing Committee, for approval of or confirmation. The deponent of this affidavit states that he was personally present at the General Body Meeting held on 5th April 1987. He has affirmed on oath that there was no discussion at this General Body Meeting in regard to a decision of the Managing Committee dated 9th September 1986. Thus, he alleges manipulation, fabrication of records by earlier Managing Committee in collusion with the appellants. With regard to the so called minutes of this meeting, in paragraph no.17, this is what is stated :-

> "... ... In 1992 some of the members had applied to the Assistant Registrar, Co-operative Societies (Co-op. Cell) Bombay Housing and Area Development Board, for copy of the proceeding dated 5.4.1987. A certified copy of the proceedings of the meeting dated 5.4.1987 which have been supplied by the aforesaid Assistant Registrar do not show that any discussion took place in regard to approval to the resolution dated 9.9.1986 of the managing committee of the Defendants. A xerox copy of the Marathi resolution dated 5.4.1987 which was furnish by the Assistant Registrar, Co-op. Society and which is signed by one S.S.Deshpande on 7.4.1987 along with English translation is annexed hereto and marked Exhibit "9". The resolution regarding approval of the agreement with Plaintiffs is shown as having been proposed by one K.G.Shinde and seconded by Arjun Palshetkar and Vithal G.

> Shinde. Whilst K.G.Shinde was present at the General Body Meeting of Defendants held on 5.4.1987, the seconders Arjun Palshetkar and Vithal G. Shinde were not present at this meeting. Xerox copy of the original attendance sheet which is signed by members is annexed and marked Exhibit "10". A xerox copy of this attendance sheet was sent on 13.4.1987 to the Authorised Officer A.S.Gholkar of the Housing Board. An English translation of the letter dated 13.4.1987 is annexed hereto and marked Exhibit "11". In regard to the meeting which was held on 14.2.1988 the notice does not refer to the agreement between Plaintiff and Defendants."

26. It was also seriously pointed out that there is no representation as far as making use of remaining land or FSI.. The lay out plan has not been submitted to the MHADA.. The MHADA has not permitted allotment of land of two acres to any developer or builder/contractor. Therefore, the terms and conditions which are alleged to have been agreed between earlier Managing Committee of the respondents and the appellants and the agreement dated 23rd November 1982, are at variance. The agreement is totally a one sided document. The same is not binding on the respondents and their members. As far as completion of the work allegedly at site in paragraph no.24 of the said reply, a serious grievance was made that assuming without admitting that the agreement is valid, the

appellants were to complete 13 buildings within 5 years from the agreement, date of issuance of commencement certificate time being essence of the contract. The work has not been carried out as per this time schedule. The appellants were never ready and willing to perform their part of contract. They are only interested in developing the additional FSI for personal gains. The last contention that was raised was that the agreement cannot be specifically performed. Compensation in terms of money for any loss which is allegedly suffered, can always be granted. The suit itself is not maintainable and therefore, the Notice of Motion deserves to be dismissed. A further affidavit in reply is filed on 10th September 1996.

27. A rejoinder affidavit was filed by the appellants on 6th September 1996 and same response was given thereto.

28. This Notice of Motion was placed before a Learned Single Judge of this Court and by the impugned order he was pleased to dismiss the same. The ad-interim order was vacated. However, the learned Single Judge noted that the advocate appearing for the respondents were

willing to have an independent Architect appointed by the Court to determine what amounts actually have spent on this project by the appellants. The members were willing to pay back these amounts to the appellants. However, learned counsel for the appellants pleaded no instructions.

29. The learned Judge has refused interim relief in favour of the appellants by observing that :-

(a) the suit agreement is a development agreement; no special performance of said agreement can be granted by virtue of Section 14 of the Specific Relief Act, 1963;

(b) that the agreement is absolutely one sided.

30. Shri Tulzapurkar - learned counsel appearing for the appellants in support of this appeal contends that the aforesaid conclusions of the learned Single Judge are wholly erroneous. He submits that the learned Judge failed to notice some undisputed factual aspects of the matter. According to him, the learned Single Judge should

have perused the plaint averments. The plaint averments on the basis of which the matter ought to be considered set out that the certificate was granted by the authorities under the Income Tax Act, 1961 on 9th February 1987 certifying that it had no objection to transfer of the land which was the subject matter of the agreement. He further submits that the averments in the plaint and the documents supporting them clearly stipulate that interest in the immovable property i.e. the land is being transferred and thus this is not a development agreement. The agreement itself postulates sub-lease in favour of the appellants. They have right to enter upon the land not only for the purposes of development but with a view to put up structures and buildings for disposal in open market on the basis that interest in the land would be created in their favour or their nominees. The correspondence in this behalf is clear. He invites my attention to page 228 of the paper book and submits that the society in it’s letter at paragraph 6 has specifically agreed that subject to obtaining prior permission from MHADA as well as of the society in its general meeting, it will have no objection for giving the land to the appellants for commercial utilisation of sub-lease for the

term of the lease that may be created by MHADA in its favour. The nominal rent was also agreed. In other words, according to Shri Tulzapurkar, the MHADA had agreed to allot the land and further permitted the respondents to engage any developer/contractor for development of the land on such terms, as it deems fit and further that necessary documents creating right, title and interest in the land would be duly executed.

31. Shri Tulzapurkar has taken us through the minutes of the general body meetings, resolutions approved in the Annual General Meeting held on 14th February 1988, minutes of the said meeting and further approval of the same. He has taken us through the correspondence with the MHADA.. He submits that the suit agreement would have to be read in the light of this correspondence and other materials. Clause 4 of the agreement along with clauses 6 and 13 would amply demonstrate that interest in the land has been created specifically. Once, the relationship between the MHADA and the society is that of lessor and lessee and the lessee is authorised to execute a sub-lease in favour of a party like the appellants, then the conclusion of the learned Single Judge that the agreement in question is a

development agreement, is ex-facie erroneous. Shri Tulzapurkar also submits that the aforesaid aspect becomes clear if one peruses the consideration that is passing between parties and shown in the agreement together with the plans. He submits that it is on the basis of the agreement that simultaneous construction of the sale component and society tenements was to be undertaken. He submits that the readiness and willingness of the appellants is apparent when 60 tenements have already been constructed at site. Rs.1.00 crore has already been spent. Thereafter, shifting of the persons in these tenements from the structures at site was to be undertaken and this is a difficult task. On the basis of this agreement only that the further progress at site would take place. The society had its own share of problems. The Administrator has admitted that there were disputes between the members. Some of them refused to shift and therefore, construction was stalled. In these circumstances, it cannot be said that the appellants were not ready and willing to fulfil their part of the agreement.

32. Shri Tulzapurkar then invited our attention to the prayers in the plaint, affidavits filed on

record and submits that there is no substance in the grievance that the agreement is one sided. He submits that the said contention is belied by the resolution and documents of the respondent society. He submits that the Administrator's affidavit ought to be accepted as that is the correct version and borne out from the documents and records of the society. He submits that as an after-thought and on the basis of some dispute which is pending, it is not possible to hold that the agreement is one sided. Moreso, when the appellants are not parties to the dispute.

33. He submits that internal dispute of the society does not take away the rights of the appellants. The respondents, cannot, as a matter of after-thought, raise a plea that the earlier Managing Committee and the appellants had colluded with each other. He submits that not only the Managing Committee Resolution is approved but there is a valid agreement now. He submits that these minutes at page 44 are fabricated. The society minutes are confirmed by the Administrator on affidavit. Actual minutes of the meeting are not produced but xerox copy which was made available from the Assistant Registrar's office, is sought to be relied upon.

He submits that original of the same is not available. In any event, the Assistant Registrar's office is not the authority with whom the minutes of the meeting of co-operative societies are filed or are normally available. He is not concerned with the internal management and business of the society. He submits, therefore, that at this stage the 5th April 1987 meeting's minutes ought to be accepted and no other version thereof can be introduced. He submits that there is no sur-rejoinder which is filed nor which is on record. In these circumstances, it cannot be said that there is any termination of agreement. There is no communication in that behalf. Assuming the minutes of the meeting held on 16th January 1994 could be said to be termination or intended termination, the same does not affect the rights of the appellants. He invites our attention to the correspondence with Municipal Corporation of Greater Bombay and the fact that the agreement was to the notice of all the members inasmuch as the copy thereof was placed on the notice board. The agreement is registered. In view of the aforesaid, the society's stand that it rejected the agreement or it is one sided, is totally unacceptable. Similarly, in the light of the

aforesaid materials, the plea that the agreement is a development agreement also cannot be accepted.

34. Shri Tulzapurkar was at pains to point out that the conclusion of the learned Single Judge that the agreement is a development agreement, is ex-facie erroneous. Assuming without admitting that the same is a development agreement, even then learned Judge has error in law in holding that no specific performance of such an agreement is permissible. He submits that the learned Judge has failed to notice the provisions of Section 14 of the Specific Relief Act in their entirety. He ought to have looked at Section 14(3)(c)(ii) and held that even if the agreement is a development agreement it is capable of being specifically enforced if the requirements stipulated by the aforesaid sub clauses and sub section of Section 14 are complied with.

35. Therefore, on the basis of vague pleas and in the absence of any particulars as also without noticing the relevant statutory provisions, relief could not have been denied to the appellants herein.

36. Shri Tulzapurkar has submitted that if the aforesaid provisions of the Specific Relief Act are noticed, then an interlocutory order passed by the Division Bench of this Court in an Appeal No.784 of 1991 cannot be relied upon. In any event, that order is subsequently distinguished in further decisions of the Division Benches of this Court. The law is that as a straight-jacket formula it cannot be said that the agreement for development is in capable of specifically performed.

37. He relies upon following decisions in support of the above propositions :-

i) Unreported judgement in Appeal No.218 of 1991 in Notice of Motion No.763 of 1989 in Suit No.844 of 1989 (Coram : M.L.Pendse and A.A.Cazi, JJ.);

ii) AIR-2003-Bom-360 (Volition Investment Pvt. Ltd. Vs. Mrs. Madhuri Jitendra Mashroo and etc.);

iii) Unreported judgement in Appeal No.784 of 1991 in Notice of Motion No.2743 of 1990 in Suit No.3067 of 1990.

38. On the other hand, Shri Doctor - learned senior counsel for the respondents submits that the order of the learned Single Judge does not call for any interference at all. He submits

that the order refuses interim relief to the appellants. The learned Judge was exercising equitable and discretionary jurisdiction. He has assigned cogent and satisfactory reasons for not granting any interlocutory reliefs in favour of the appellants. Apart from the conduct of the appellants, on merits also, no prima facie case is made out by them. The balance of convenience is also not in their favour. On the other hand, the appellants are obviously interested in grabbing the property without providing proper accommodation to the respondents. The respondents are persons from lower middle strata of the society. They being unaware of the niceties, cannot be made to suffer.

39. Shri Doctor points out that keeping in mind the aforesaid aspects, the learned Judge has refused the application for interim reliefs. Such discretionary and equitable order need not be disturbed by us merely because another view of the matter is possible.

40. Shri Doctor submits that the land belongs to MHADA. There was a conditional allotment in favour of the respondents. He submits that from the very nature of the arrangement allegedly

arrived at, the appellants were inducted as contractors/developers. They were to merely develop the property in accordance with the terms and conditions imposed by MHADA on the respondents. There is no question of the appellants getting any right, title or interest in the immovable property i.e. the land, unless and until they have an independent arrangement with MHADA.. The property belongs to the MHADA.. It is a public property and cannot be alienated merely by the respondents.

41. According to Shri Doctor, apart from the aforesaid, the suit is for enforcement of a development agreement. He submits that the entire agreement is silent as far as title. No area is demarcated for sub-lease. He invites our attention to the Lease Deed dated 16th June 1986 and 14th February 1990. He states that assuming without admitting that the so called letters addressed by the members of the then Managing Committee are on record, even then, this is not a case where it could be said that any rights are created in favour of the appellants in the land itself. Shri Doctor has invited our attention to the letter addressed by the appellant no.1 on 16th June 1986 which clearly records their

agreement to develop the property of ten acres. He also invites our attention to the letter dated 11th September 1986 (Exhibit C-2) and contends that whether the arrangement is of eight acres or ten acres, is itself doubtful. He submits that everything is dependent upon the permission from MHADA.. He submits that at no stage was any Solicitor of the respondents involved. He has taken us through the conditions imposed in clauses 6, 8 and 9 of the letter dated 11th September 1986. He submits that no draft was prepared and exchanged between the Advocates and Solicitors. There are no plans, specifications and details. He submits that by banking at the agreement itself a conclusion cannot be drawn that any right, title or interest is created in favour of the appellants in respect of the land in question. On the other hand, if the prior correspondence is to be looked at together with the agreement, then it is clear that no details are provided. The agreement is vague. It will be a case where continuous supervision of this Court would be necessary. This Court will have to monitor all aspects of the development of the project. It is because of this that the learned Judge has rightly held that such an agreement is not capable of being specifically performed.

42. Shri Doctor takes us through the letter dated 13th September 1986 and more particularly clauses 1 and 8 therein. He has also taken us through Exhibit C-4 which is a letter addressed on 15th September 1986 by the then Secretary of the respondents. He submits that if Exhibit C-5 is perused, then it is clear that at the so called meeting held on 9th September 1986, all that was decided was that the appellants are a proper contractor to carry out construction of the housing project. The appellants are chosen as contractors. There is no question of the appellants contending on the basis of this letter/resolution that it was the decision of the Co-operative Society to not only appoint them as developers but to create any right, title and interest in their favour.

43. Shri Doctor was at pains to point out that the so called resolution of the Managing Committee cannot be termed as an agreement. It is at the most an approval of the name of the appellants as contractors. He submits that not only were the respondents mislead by the appellants but also the authorities exercising powers under the Income Tax Act, 1961. He

submits that while filling up the form for seeking approval (Form No.37-I) it was falsely stated by the appellants that there is an agreement for transfer of the property allegedly arrived at on 23rd September 1986. In fact, there is no such agreement in existence. All that is there is the letter Exhibit C-5. It is not an agreement. Therefore, on the basis of such a got up document and with misleading contents thereof, the approval was sought from the Income Tax authorities. That apart, even when the form was filled up, all that was stated by the appellants were that they have an agreement for development in their favour. Thus, a certificate obtained from the Income Tax Authorities gets vitiated because of a fraudulent and false declaration. The appellants have approached this Court with unclean hands. There is no discretion nor equity in their favour.

44. Shri Doctor then makes a grievance about the minutes of the meeting held on 5th April 1987. He states that there is intrinsic evidence of interpolation and alteration. He submits that the resolution is clearly fabricated. Inasmuch as there was no decision taken at the meeting to appoint the appellants or to enter into an

agreement with them. If no decision is taken, then there is no question of a resolution being passed on that basis. On the other hand, a perusal of the minutes clearly demonstrates that a decision was taken to await the policy of the Government about transfer of lands to occupants of structures constructed thereon. A scheme was being formulated at that time by the State Government. Unless and until the authorities evolve a scheme, it cannot be said that persons in occupation of the structures on different lands can claim any rights in the lands and on that basis enter into agreements for developments. He submits that on a perusal of the minute book itself this aspect becomes clear. The said minute book, as far as minutes of the aforesaid meeting, bare no date. On the other hand, the Assistant Registrar's Office has a report of the meeting. When he forwards a copy of the said report incorporating therein the events at the meeting, it is apparent that there is no resolution passed with regard to entering into any agreement with the appellants, leave alone creating any right, title or interest in respect of the land.

45. Shri Doctor then takes us through the terms

and conditions of the letter of allotment issued by the MHADA.. He emphasises condition no.3 at page 261. He also invites our attention to society's response at page 272 and further letter of MHADA dated 26th March 1990. He submits that unless and until terms and conditions are complied with, at different stages this Court cannot grant any relief in favour of the appellants. Therefore, assuming without admitting that MHADA permits any such transaction, the transaction itself is subject to compliance with the terms and conditions. The transaction envisages a complete project which has to be undertaken and completed phasewise and stagewise. One of the stage is shifting of tenants. This Court will have to monitor every such aspect in detail which is impermissible.

46. Shri Doctor then takes us through the agreement and states that in the plaint, in paragraph 20, the averments are in the following terms :-

> "... ... 20. The Plaintiffs by their letters dated 2.3.1992 and 9.10.1992 informed the Defendants from time to time the progress in the construction work being carried out on the suit property."

He submits that neither are these letters produced nor are they available any where on record. He submits that the averments in the plaint would indicate that the construction had commenced even prior to the agreement. The agreement is executed on 23rd November 1992. The correspondence that is referred to in the aforesaid paragraph, is of March and October 1992. Thus, there is a grave doubt about the agreement and the nature of the transaction contemplated therein. He submits that on 17th February 1993, the Administrator was appointed on the society. The agreement is signed pursuant to the resolution dated 17th November 1992. He submits that on affidavit it has been pointed out that the term of the Managing Committee was over on this date. There are no elections held after 1987. Shri Doctor invites our attention to Section 73-H of the Maharashtra Co-operative Societies Act and contends that there is a failure to abide by the statutory mandate.

47. Assuming without admitting that the so called agreement is entered into at every stage in the said agreement and in the correspondence preceding the same, the intention is clear namely to permit development of the property alone. The

appellants have been termed as "Developer" therein through out. He invites our attention to several clauses of the agreement and finally to clause 29 which incorporates an undertaking of the society not to revoke the agreement. He submits that the agreement is, therefore, totally one sided. It is illegal. It is also void because it purports to create a right, title and interest in respect of a property and benefits flowing therefrom, which can never be possessed by the respondents. The FSI/additional TDR cannot be said to be belonging to the society. There is no fulfilment of the stipulations under the Development Control Regulations. There is no time limit for obtaining Commencement Certificate. All spaces and areas which are of the ownership of the MHADA and which could come to the society or which could come to the society as common areas, are also purported to be handed over. In these circumstances, it cannot be said that the agreement can be enforced by the appellants.

48. He submits that there is alternate claim for damages. The apparent consideration has clearly been noted in the documents submitted to the Income Tax Authorities. The certificate is an

estimate of the profits likely to be earned in the project by the appellants. The losses are, therefore, clearly being computed in terms of money. In these circumstances and when there apparent collusion of the appellants with the then Administrator and the General Body of the society is by-passed, bye-laws are breached, then it is impossible to grant any discretionary or equitable reliefs to the appellants.

49. Shri Doctor has reiterated alternate suggestion which was made before learned Single Judge. He has taken us through the provisions of Section 14 of the Specific Relief Act. He submits that assuming that Section 14(3)(c)(ii) thereof is applicable, respondents are willing to pay the costs/price of the construction. For all these reasons he submits that the appeal be dismissed.

50. Shri Doctor places reliance upon following decisions :-

i) AIR-1936-Madras-564 (Zeebunnisa Begum Vs. Mrs.H.B.Daxagher and another);

ii) 1896-The Indian Law Reports-Vol.XXII-46 (Ramchandra Ganesh Purandhare Vs. Ramchandra Kondaji Kate);

iii) An unreported decision in Interim Application No.590 of 1996 in Suit No.185 of 1996 (Vijay Dixit Vs. Sheila Khanna) (Coram : S.D.Pandit, J.);

51. Shri Modi who appeared for the appellants in rejoinder, states that the MHADA is not a necessary party. There is no substance in the grievance of Shri Doctor that there are no plans, lay out, specifications and therefore, the agreement is incapable of specifically enforced. He submits that the aforesaid grievances are raised only to get over the most important and relevant submission on the part of the appellants, namely that the agreement is acted upon. Three buildings are already constructed. He submits that at an interlocutory stage it will not be possible for this Court to pronounce upon the issues about illegality, validity as well as enforcibility of the agreement. Hence, appropriate interim orders and reliefs must be granted. The appeal be allowed.

52. In view of these contentions, the only question that falls for our consideration is whether the order of the learned Single Judge requires any interference at our ends. For answering that question, it will have to be necessarily decided as to whether the appellants

have made out a prima facie case and that balance of convenience is in their favour so also it will suffer irreparable harm and injury. For the reasons indicated hereinbelow, we are of the opinion that the learned Judge was right in refusing the interlocutory reliefs and on that basis dismissed the Notice of Motion.

53. The undisputed facts are that the land belongs to MHADA.. That was in possession of the members of respondent who are housed in structures on the same. The request was to allot the land for construction of buildings to accommodate the occupants of the structures. That could be done, according to the respondents, on a portion of land. According to the respondents, the request was to allow construction of buildings on such portion through the agency of builder/developer. Further, permission be given to sub-lease the remaining portion of the land so allotted to such builder/developer.

54. The MHADA has, as far as this request is concerned, referred to a Government Resolution dated 8th February 1988. It also refers to a Resolution No.1580 and pursuant to all this, a

decision is reached to allot the land at Siddharth Nagar, Goregaon, Division-I. The terms and conditions of allotment are set out in the annexure to the letter of allotment dated 14th February 1990. The location of the land is set out at Annexure-B to the said letter. The respondents had to comply with several conditions and the letter dated 14th February 1990 very clearly shows that on compliance of the requirements by the society, further action in the matter will be taken. The terms and conditions are that land admeasuring 13.10 acres gross (which includes 10 acres net land) out of 40 acres belonging to MHADA, will be allotted to the respondent society of 672 tenement holders on lease. The lease-deed and allotment would be subject to condition no.3 stipulated in Annexure-A to the letter dated 14th February 1990 being complied with. That condition no.3 has various stages. Stage-1 is shifting of tenants, Stage-2 no objection for construction, then again shifting of tenants from part of the land and only after shifting of the tenants from Part-B of the land and fulfilment of all the terms and conditions, an agreement would be entered into in respect of 13.18 acres gross land. The residents' co-operative society was to be given

permission for construction of buildings on the portion other than the land for rehabilitation of the residents, only after fulfilment of the terms and conditions and necessary action is taken by the society. Acceptance of this letter of allotment together with it's conditions is indicated by the respondents' letter dated 9th March 1990, and further request has been made by this letter to MHADA.. The response of MHADA to this letter of society is dated 26th March 1990. The MHADA has more or less not deviated from the terms and conditions and that is clear from condition no.11 stipulated in the letter dated 26th March 1990. Thereafter, there is also a letter from MHADA on 3rd September 1990. The entire case will have to be considered in the backdrop of the admitted fact about ownership of the land.

55. We see much substance in the contentions of Shri Doctor that the learned Judge was right in both prima facie conclusions arrived at by him.

56. With the assistance of Shri Tulzapurkar and Shri Doctor we have perused the plaint and the annexures thereto. We have perused all affidavits filed in reply and/or rejoinder. We

have perused the relevant correspondence. We have also gone through the minutes of the meetings relied upon by the parties.

57. As far as first conclusion of the learned Judge that the agreement is a development agreement, we are of the opinion that prima facie, the agreement cannot be read in isolation as is sought to be done. Although, Shri Tulzapurkar urges that the agreement has to be seen and considered in the context of and together with the correspondence prior thereto, it is clear that when he submits that interest in the land is created in favour of the appellant, he reads only the clauses in the agreement. The fallacy in his submission would be clear if one peruses the correspondence prior to the agreement. If the letters of MHADA referred to above and the response of the society thereto is perused, it is clear that a conditional allotment is what is the nature of the right of these respondents. They may be inhabitants and occupants of the structures but ultimately the property belongs to and vests in MHADA.. The same is a public property. The terms and conditions of its allotment are subject to rules and regulations framed by MHADA as also policies

of the Government. One cannot ignore that fact and hold as if the respondents without any reference to MHADA, could have created any rights in favour of the appellants herein. The respondents are very careful while dealing with the appellants inasmuch as they have not in any manner deviated from the stand that what is under consideration is the appellants' proposal to develop the property. That the appellants also come forward with the proposal to develop the said property, is clear from the correspondence. Assuming that the same is on the record of the society, it is clear that the said correspondence culminated in the so called resolution of the Managing Committee about accepting the proposal of the appellants to develop the property. The use of the word "Developer" and "Contractor" in the letters preceding the agreement as also at various places in the agreement, would prove this fact. Prima facie, therefore, when the land is belonging to MHADA and MHADA gives a conditional allotment stipulating that the lease itself is subject to compliance of the conditions by the respondents, then what the respondents could have agreed to transfer and/or hand over is something which would fructify after compliance of the terms and conditions imposed on them. Neither

the respondents nor the appellants claiming through them can say with any degree of certainty that right, title and interest is created in their favour in respect of the said land.

58. The terms and conditions of the letter of allotment as referred to above contemplates stagewise development of the land. That it is stagewise and that subject to the compliance of the terms and conditions and in a phased manner, is something which is accepted by the respondent society. Therefore, it cannot be said that the respondent society seeking permission of MHADA for allotment of the property and thereafter a lease in its favour can confer any right higher than the same on the appellants. That the appellants have agreed to take over such right is clear from a perusal of the agreement. Each of the recitals thereto are eloquent enough. At internal page 8 of the agreement (running pages 284 and 285) a reference is made to the correspondence with MHADA and more particularly the terms and conditions in the letter dated 3rd September 1990. It is clear from the recitals that pursuant to the allotment letter and subject to the terms and conditions stipulated by MHADA that the developer is informed by the society

that remaining two acres out of the net area of 10 acres of land is permitted to be developed as per Development Control Regulations. Further, the recital in running page 9 of the agreement refers to the obligations which are undertaken by the society. That the parties agree to the following stipulation is also clear :-

> AND WHEREAS the Society has, prior to the date hereof, given inspection of all the correspondence exchanged between the Society and the said Authority and the Developer has duly acquainted itself with all the contents thereof;"

It is in this light that the terms and conditions in the agreement and more particularly clauses 4 and 6 thereof have to be construed. To our mind, it is clear that a phasewise development project at site was in contemplation and the involvement of the appellants therein is for the said purpose. Unless and until all stages are complete the intention is that no interest in the land would be created in favour of anybody. Therefore, when appellants are involved in such a project, then they are really seeking enforcement of a development agreement stipulating compliance with terms and conditions of the letter of allotment. In our view, this is to be monitored

and supervised by this Court.

59. Therefore, assuming that Shri Tulzapurkar is right in his contention that all development agreements are not necessarily unenforceable, yet, in the present case, from a perusal of the entire materials it is clear that the project envisaged and undertaken by the appellants pursuant to the said agreement is development of the land. Therefore, this Court would be called upon to monitor and supervise the project phasewise. Unless and until such monitoring and supervision in minute details is done, the compliance of the terms and conditions stipulated in the letter of allotment is not possible. If that be the position, then no question arises of the society getting any right in the property until compliance is made of all these terms and conditions. To our mind, this Court would, therefore, be required to place itself in the position of MHADA and supervise and monitor construction and development of the project. That being impermissible in law, the learned Judge is right in the conclusion that prima facie the agreement is for development of an immovable property and therefore, not specifically enforceable.

60. Therefore, accepting the submission of Shri Tulzapurkar that the agreement in question must be considered in the light of the correspondence preceding the same, the conclusion of the learned Judge can still be upheld. The Court would be called upon to monitor and supervise a project in details at the instance of the appellants who are Professional Builders. Therefore, it is not necessary to go into other pleas of Shri Tulzapurkar about true and proper interpretation of Section 14 of the Specific Relief Act, 1963. From the materials produced in the present case, we are satisfied that the appellants cannot urge that right, title and interest is created in their favour merely because upon terms and conditions of the allotment letter being complied with the respondents agreed to execute a sub lease in their favour.

61. We find much substance in the contention of Shri Doctor about agreement being one sided. Existence of the letters by the society preceding the decision of MHADA is seriously disputed. Similarly, the resolution allegedly passed at the meeting of 5th April 1987 is also not what is borne out from the events at that meeting. When

the house resolved that it should await the policy of the Government, then it is inconceivable that in the same meeting a decision would be taken to appoint the appellants and/or execute any agreement in their favour. The minutes of the meeting held on 5th April 1987 record the discussion and the resolution to await the policy of Government. All further steps were dependent upon the Government Policy.

62. The other discussion and resolution is not recorded at all in the summary of the deliberations which have been forwarded through the office of Assistant Registrar, Co-operative Societies, Mumbai. The summary has been perused by us with the assistance of the learned counsel appearing for both sides. On a close scrutiny thereof it is clear that as far as decision at the meeting to await the Government policy is concerned, the recording pertaining to the same is common i.e. in the copy produced by Shri Tulzapurkar and the summary by Shri Doctor. In other words, both the minutes are placed on record by Shri Tulzapurkar and the summary, copy of which is placed on record by Shri Doctor, reiterate the discussion pertaining to Government policy and the resolution to await final decision

by the Government, which is unanimous. It is, therefore, not possible that when such an event takes place and gets recorded that a resolution would be moved to appoint appellants as the developers. As of 1986-87 there was nothing on record to hold that the land is allotted or would be allotted in furture to the respondent society. There is also a serious doubt about existence of the correspondence between the then office bearers and the appellants. In these circumstances, there is a grave doubt about any resolution being moved and carried, as suggested by the appellants. Prima facie, we are of the view that the summary, a copy of which is placed on record by Shri Doctor together with agenda of the said meeting, reflects correct position. This affects the legality and validity of the Agreement dated 23rd November 1992.

63. It is apparent that the members of the respondents come from lower middle strata of the society. They are staying in dilapidated structures for years together. Their urge to have a permanent housing accommodation for themselves, has been exploited by the appellants who are professional builders and through them a valuable property in a city like Mumbai is being

developed for commercial motives and profits. There can be no objection in the respondents getting a permanent accommodation for themselves by utilising services of a professional builder but when the professional builder proceeds on the basis that he is going to get a right, title and interest in public land and public property, then the whole transaction cannot be said to be merely for the benefit of the poor sections of the society. The members of the respondent society are not expected to be and were not at the relevant time aware of the consequences of involving the appellants. The Administrator also has not protected their interest but supported the appellants. We have reproduced the averments in the further affidavit. They are corroborated by documents. They had a limited interest inasmuch as their dream of having a permanent roof over their head was being fulfilled. However, when they realised that the entire scheme is only for the benefit of the builder, then they rightly stepped in and passed a resolution on 16th January 1994 putting an end to the agreement.

64. With the assistance of the learned counsel appearing for both sides we have perused the

resolution of the meeting held on 16th January 1994 and it is clear from a reading thereof that the house resolved by majority not to approve the agreement dated 23rd November 1992. Once all these events are taken note of and reliance placed on clause-29 by Shri Doctor is seen in this light, then the conclusion of the learned Single Judge that the agreement is totally one sided, cannot be faulted. The builder was to benefit not only in the form of FSI and TDR but was also aiming at appropriating the open areas as well as all profits from the disposal of the benefits attached to the land. It cannot be forgotten that this is subject to fulfilment of the terms and conditions imposed by MHADA on the society. The Court exercising equitable and discretionary powers cannot become a party to such an arrangement. No discretionary and equitable reliefs can be granted in favour of the appellants who come to Court with such a case.

65. In the light of the aforesaid observations and findings, all of which are prima facie, we are of the view that the learned Judge was right in dismissing the Notice of Motion. The other submissions namely whether compensation in money affords adequate relief, need not be gone into in

details. Once the conclusion is that the agreement is a development agreement, then obviously the alternate claim for damages and compensation would afford adequate relief. Even otherwise, the estimate thereof is available on the record in the form of the documents before the Income Tax Authority. The project cost and the possible profit therefrom has been more or less estimated. Any further materials are always permissible to be placed at the trial.

66. In view of the above, the submissions of learned counsel appearing for the appellants that the order of learned Single Judge is erroneous and requires our interference has to be rejected.

67. For the purposes of our conclusions we have also taken notice of the proceedings which are pending before the Co-operative Court. It is clear that the Co-operative Appellate Court has not continued the interim order and therefore, today all that remains is the dispute under section 91 of the Co-operative Societies Act. The then office bearers who are now in minority, are engaged in a battle for control of the affairs of the society. However, for our purposes it is not necessary to go into further

details. We are, therefore, of the view that on both counts namely that the agreement is not specifically enforceable and that the said is totally one sided as well as not in the interest of the respondents, the learned Judge was right in the prima facie conclusion.

68. The order under appeal is, therefore, confirmed for additional reasons. The appeal is accordingly dismissed. There will be no order as to costs.

(DR.S.RADHAKRISHNAN, J.)

(S.C.DHARMADHIKARI, J.)